
U.S. Department of Labor
Office of Administrative Law Judges
Seven Parkway Center
Pittsburgh, Pennsylvania 15220
(412) 644-5754

DATE: JANUARY 31, 1992

CASE NO.: 91-ERA-20

In the Matter of:

FRANK BAUSEMER,
Complainant

v.

TU ELECTRIC,
Respondent

Appearances:
Billie Pirner Garde, Esq.
For the Complainant

David C. Lonergan, Esq.
For the Respondent

Before: THOMAS M. BURKE
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This is a proceeding brought under the Energy Reorganization Act of 1974 ("ERA"), 42 U.S.C. § 5851 and the regulations promulgated thereunder at 20 C.F.R. Part 24. These

---

provisions protect employees against discrimination for attempting to carry out the purposes of the ERA or of the Atomic Energy Act of 1954, as amended, 42 U.S.C.A. § 2011, *et seq*. The Secretary of Labor is empowered to investigate and determine "whistleblower" complaints filed by employees at facilities licensed by the Nuclear Regulatory Commission ("NRC") who are discharged or otherwise discriminated against with regard to their terms and conditions of employment for taking any action relating to the fulfillment of safety or other requirements established by the NRC.

In this proceeding, the Complainant, Frank Bausemer, a nuclear industry quality control inspector, contends that Respondent, TU Electric, engaged in a continuous pattern of blacklisting by denying him available employment at the Comanche Peak Nuclear Power Plant in Glen Rose, Texas, in retaliation for engaging in activities protected by the Act.

The District Director of the Fort Worth, Texas, regional office of the Employment Standards Administration, United States Department of Labor, after an investigation, found no evidence that Respondent had engaged in blacklisting the Complainant for rehire, either directly or indirectly, at the Comanche Peak Nuclear Power Plant.

Complainant appealed the Employment Standard Administration's order to the office of Administrative Law Judges by Western Union Mailgram received on January 17, 1991. A hearing was scheduled for February 20 and 21, 1991 in Dallas, Texas. It was continued at the request of Complainant because he needed additional time to prepare his case. The hearing was rescheduled for May 7 and 8, 1991 and later for June 25 and 26, 1991 but in both instances was continued at the request of Complainant as he requested time to complete discovery.

The hearing was held on August 20, 21, 22, 26 and 27. Post hearing briefs were due on or about October 24, 1991.[1] Upon request of Claimant the date for submission was extended to November 6, 1991. Reply briefs were received on November 18, 1991.

FINDINGS OF FACT

Comanche Peak Steam Electric Station is a two-unit nuclear

---

power plant owned and operated by Respondent. The plant is located 45 miles southwest of Fort Worth, Texas. Comanche Peak's Unit 1 is in commercial operation and the construction of Unit 2 is near completion. The construction of Comanche Peak began in late 1974. Unit 1 was completed near the end of 1989. In January of 1990, Respondent received a license from the Nuclear Regulatory Commission ("NRC") to load fuel and commence low power operations of Unit 1. By March of 1990, the Respondent was in the process of low power testing of Unit 1. Unit 1 began commercial operation in August of 1990.

The construction of Unit 2 was suspended near the end of 1988 so that all efforts could be directed towards the completion of Unit 1. Construction resumed in 1991. It is nearly completed and system testing has begun.

Complainant was employed at Comanche Peak from October 1987 until March 1988 by Ebasco, a contractor of Respondent, and from January 1989 until November 1989 by Fluor Daniel, also a contractor, as a quality control receiving inspector. He was laid off on November 3, 1989.

On November 2, 1989 Complainant and Forbee Harper, another quality control inspector, were inspecting "thermo-lag", a material applied to electrical cables and other articles for protection against fire and the heat of a fire. Complainant discovered that a high percentage of the thermo-lag panels were deficient in that they did not meet the minimum thickness requirement. Complainant brought the deficiency to the attention of his lead inspector, Willie Wolf. Wolf instructed Complainant and Harper to write a nonconformance report on the thermo-lag. Greg Bennetzen, a level-3 inspector, disagreed with Wolf's instructions. He instead instructed that an unsatisfactory report or an "Unsat IR" be written. An argument which became "pretty heated" ensued between Complainant and Bennetzen. Approximately one hour later, Complainant was notified that he was being laid off because of a reduction in force.

Complainant considered his lay off to be in retaliation for identifying the thermo-lag as defective. In December of 1989 he filed a Complaint under Section 210 of the Act with the Department of Labor against the Respondent, Fluor Daniels and Brown & Root, Inc., an onsite contractor of the Respondent, alleging that he was discharged in retaliation for identifying

---

and reporting the defective thermo-lag material. Claimant and the three respondents agreed to settle the Section 210 complaint without admitting liability. On March 30, 1990, Complainant executed a mutual release, releasing TU Electric and the other respondents "from any and all claims for liability arising out of his employment at or involvement with the CPSES nuclear project". The settlement did not provide for Complainant's reinstatement to his job at Comanche Peak. However, it did provide that Complainant "will be fairly and equitably considered for any further employment at CPSES Unit 2, when construction commences, and during refueling outages at Unit 1, provided that he apply for and be qualified for the positions available at Comanche Peak Steam Electric Station."[2]

Complainant contends that he has not been fairly considered for employment openings at CPSES and, in fact, has been blacklisted from employment there as a result of his actions surrounding the thermo-lag incident. Complainant's allegations, if proven, would constitute a violation of the employee protection provisions of the Act.

Complaint Timely Filed

Section 210(b)(1) of the Act sets forth time limits within which a complaint must be filed. It provides:

> Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of Subsection (a) may, within thirty days after such violation occurs, file a complaint with the Secretary of Labor alleging such discharge or discrimination 42 U.S.C. § 5851(b)(1).

Also, §24.3(b) of the DOL regulations provides that "[a]ny complaint shall be filed within 30 days after the occurrence of the alleged violation. 29 C.F.R. § 24.3

Prior to the hearing, Respondent filed a Motion to Dismiss or in the Alternative for Summary Judgment, moving that the Complainant's action be dismissed because it was not filed within the time period allowed by the Act. Respondent's motion was denied by Order Denying Motion To Dismiss Or For Summary Judgment dated June 21, 1991 for two reasons: (1) The 30-day statue of limitations does not commence running until the employee becomes

---

aware or reasonably should have been aware that he was a victim of a discriminatory act, and Respondent did not allege in its motion that Complainant had either actual or constructive knowledge of the acts which form the basis of his complaint more than thirty days before he filed the complaint;[3] and (2) Complainant alleged that he was actively misled by the Respondent into believing he was being treated in a nondiscriminatory manner, and Complainant must be given an opportunity to prove the facts supporting his allegations.

Respondent again moves that the complaint be dismissed. It contends that the evidence admitted at hearing shows that Complainant had knowledge of the acts which form the basis of his complaint prior to the 30-day statute of limitations period.

It is well-settled that a complaint under the Act must be filed within thirty days of the occurrence of the alleged violation and that failure to timely file a complaint is grounds for dismissal. *English v. Whitfield*, 858 F.2d 957 (4th Cir. 1988) and *Cox v. Radiology Consulting. Associates*, Case No. 86-ERA-17 (August 22, 1986) (Recommended Decision and Order), slip opinion at 11, adopted by Secretary of Labor (November 6, 1986).

The basis for Complainant's charge of blacklisting is Respondent's failure to hire him as a quality control receiving inspector, the position Complainant held when he was laid off on November 3, 1989. Announcements of openings in the receiving inspector position were made in April and May 1990 when Respondent was introducing a program for

employment of workers known as the "staff augmentation program." The staff augmentation program was implemented throughout the plant during late 1989 and 1990. Under staff augmentation, the employees are employed by a contractor but work directly under Respondent's supervision, supplementing Respondent's own work force. The staff augmentation employee is compensated by his employer and not by Respondent. Respondent pays the employer a commercial rate based upon a bidding process for the work performed by the employee. The purpose of the program is to reduce costs by reducing the rate of pay to contractors providing loaned employees.

Implementation of the staff augmentation program mandated

---

that the quality control organization at Comanche Peak solicit bids for the six receiving inspector positions from staff augmentation contractors. Names of candidates for the positions, including that of Complainant, were submitted by staff augmentation contractors. Nevertheless, those holding the positions prior to the staff augmentation program all retained their jobs. It was the manner of filling these positions that Complainant contends constitutes disparate treatment. He argues that his candidacy did not receive fair consideration.

It is undisputed that the receiving inspector positions were filled prior to the 30-day statute of limitation period. The record also shows that Complainant became aware of the filling of the receiving inspector positions, and that he was not selected for one of the positions, prior to the thirty-day statutory period. Danny Leigh is the procurement supervisor at Comanche Peak and the direct supervisor of the six receiving inspectors. His testimony is relevant on the question of when Complainant became aware that he would not be selected for one of the inspector positions. He testified that Complainant telephoned him during the staff augmentation transition period to inform him that he was submitting an application for the inspector position through one of the staff augmentation contractors, and to request that his application receive fair consideration. Leigh responded that Complainant's application would be considered but that he intended to retain the six incumbents. Leigh testified that Complainant telephoned him a second time after the transition to staff augmentation had been completed to inquire about the position, at which time Leigh informed Complainant that the six receiving inspector positions had been filled by the incumbents. The later conversation took place at the end of July, 1990, well before the commencement of the limitations period.

The fact that Complainant knew that the six positions had been filled does not mean that he had knowledge that Respondent acted in a discriminatory manner in their selection. In fact, Claimant sought and received a meeting with Susan Palmer, a management employee of Respondent who was involved in Complainant's settlement, to discuss the status of his application for employment and the likelihood of his obtaining employment with Respondent. Complainant questioned Palmer on the hiring policy under

staff augmentation; the number of individuals who were hired with the same qualifications as Complainant; and the

---

[Page 7]

reason that individuals are hired as receiving inspectors who have less qualifications than Complainant.[4] Clearly, Complainant was at this time looking for answers. However, Respondent's answers to Complainant's questions in a letter dated September 28, 1990 do not provide evidence of discriminatory hiring.[5]

Under § 24.3(b) of the regulations, if a discriminatory course of conduct is alleged and proven, at least one of the discriminatory acts must fall within the thirty-day period. *Cox, supra*. Claimant has not identified any act of alleged discrimination which occurred, or of which he became aware, within thirty days of the filing of the Complaint. Since the only discriminatory act alleged by Complainant, his failure to be hired as a receiving inspector, fell outside the thirty-day period, as did his awareness of that act, Complainant's complaint must be considered to be untimely filed.

Equitable Tolling

Complainant alleges that at the same time he was the victim of discriminatory hiring activities by Respondent, he was being actively misled into believing that he was being fairly considered for all available positions for which he had submitted an application. Complainant's allegations, if proven, would toll the thirty-day statute of limitations. The Courts have construed the thirty-day period in like statutes as being analogous to statutes of limitation and thus subject to equitable tolling if a Complainant is actively misled into delaying the filing of his complaint. *School District of Allentown v. Marshall*, 657 F.2d 16 (3d Cir. 1981). The Court in *City of Allentown, supra*, warns, however, that the restrictions on equitable tolling must be scrupulously observed; the tolling exception is not an open invitation to the courts to disregard limitation periods simply because they bar what may be an otherwise meritorious cause.

Complainant, in his post hearing brief, alleges that he was misled by letters from Palmer as well as a letter dated July 30, 1990 from William J. Cahill, Jr., Respondent's Executive Vice President.

Palmer wrote two letters to Complainant. The initial letter, dated September 28, 1990, was in response to questions

---

[Page 8]

asked by Complainant in their August 8, 1990 meeting. The second letter, dated October 30, 1990, was in answer to a September 15, 1990 letter to her from Complainant. Complainant did not testify that the letters included any nonfactual information in

response to his questions. In fact, Claimant did not testify that he was in any way misled by the letters.

The letter from Cahill is addressed to "To Whom It May Concern". It merely states that Complainant "should be fairly considered for employment at CPSES in positions for which he has applied and is qualified" and that Complainant's actions in pursuing his concerns through the NRC were consistent with Respondent's policy and appreciated by management as being taken to assist them in insuring the safety of the facility. Cahill was obligated to write the letter under Respondent's agreement with Complainant settling Complainant's first DOL complaint. Complainant did not testify that he was misled by the letter and there is nothing apparent in the letter which could be considered as misleading Complainant into not filing a complaint.

Moreover, it appears that, as a matter of law, the letters from Palmer and Cahill do not constitute sufficiently deliberate conduct by Respondent to toll the statute. In *Price v. Litton Business Systems, Inc.*, 694 F.2d 963 (4th Cir. 1982), the Court held that the statute of limitations could not be equitably tolled by letters to the plaintiff from the respondent/employer stating that the employer was attempting to find plaintiff another job in the company and detailing additional job opportunities. The Court reasoned:

> [t]he statute of limitations will not be tolled on the basis of equitable estoppel unless the employee's failure to file in timely fashion is the consequence either of a deliberate design by the employer or of actions that the employer should unmistakably have understood would cause the employee to delay filing his charge. An employee's hope for rehire, transfer, promotion, or a continuing employment relationship - which is all that plaintiff asserts here - cannot toll the statute absent employer conduct likely to mislead an employee into sleeping on his rights." Id. 694 F.2d at 965-966

Accordingly, it is determined that the evidence of record

---

shows that Complainant's complaint was not timely filed and the Complainant has not shown that he was misled by Respondent's conduct to the extent that the thirty-day statute of limitations should be tolled by equitable considerations.

Merits of Claim

Assuming, *arguendo*, that the complaint was timely filed, the record does not show that the Respondent engaged in disparate treatment toward Complainant, that is, the Complainant has not shown that the Respondent blacklisted him from a job at the Comanche Peak Power Plant.

Prima Facie Case

The requirements for establishing a *prima facie* case under Section 210 were set out by the Sixth Circuit Court of Appeals in *DeFord v, Secretary of Labor et al*, 700 F.2d 281 (6th Cir. 1983). They are: (1) that the party charged with discrimination is an employer subject to the Act; (2) that the complaining employee was discharged or otherwise discriminated against with respect to his compensation, terms, conditions, or privileges of employment; and (3) that the alleged discrimination arose because the employee participated in an NRC proceeding under either the Energy Reorganization Act or the Atomic Energy Act of 1954. *Id*. at p. 286.

Initially, Respondent does not contest that it is subject to the Act by virtue of its ownership and operation of the Comanche Peak Nuclear Power Plant in Glen Rose, Texas.

Protected Activity

Complainant was laid off from his job on November 2, 1989. He believed that the lay off occurred because of his dispute with Bennetzen over the reporting of the nonconforming thermo-lag material. He sought assistance from CASE,[6] a local citizens group that was monitoring the safety of the Comanche Peak Plant, from SAFETEAM, an independent contractor group located onsite at Comanche Peak which receives and investigates employee concerns, as well as from the NRC. His complaints prompted investigations by all three groups. As previously stated, Complainant also filed a Section 210 complaint with the DOL, which culminated in

---

the March 30, 1990 settlement agreement. Complainant's complaints to the NRC and DOL as well as his cooperation with their subsequent investigations constitute protected activity.

Failure To Be Rehired

Complainant has shown that he engaged in protected activity and that he subsequently was not rehired at the Comanche Peak plant, even though Respondent agreed in the March 30, 1990 settlement to fairly consider Complainant for any openings that he applied for. To establish a prima facie case. Complainant must present evidence sufficient to raise the inference that the protected activity was the reason that he has not been rehired. *Dean Dartey v. Zach Company of Chicago*, Case No. 82-ERA-2, *slip op.*, Secretary of Labor, (April 25, 1983). *Stack v. Preston Trucking Co.*, Case No. 86-STA-22, *slip op*., Secretary of Labor, February 26, 1987), and *Haubold v. Grand Island Express, Inc.*, Case No. 90-STA-10, *slip op*., Secretary of Labor, (April 27, 1990).

During the period relevant to this complaint, employment at Comanche Peak was in steep decline. A dramatic reduction in the number of workers at the plant was caused by the suspension of construction on Unit 2 in late 1988, and the completion of construction

on Unit 1 in late 1989. In January, 1988, there were approximately 11,000 workers on both units. By March 1990 the number of workers had decreased to 3,100. Of the 3,100 workers at Comanche Peak in March of 1990, approximately 1,300 were employees of Respondent and 1,800 were employed by contractors. When Complainant was laid off on November 2, 1989, he was one of approximately 8,000 workers whose employment was ended in a reduction of force at that time.

Notwithstanding the decline in employment at the plant, Complainant contends that vacancies did occur in the position of receiving inspector and that he did not receive fair consideration when those positions were filled.

The staff augmentation program was implemented throughout the Comanche Peak plant during late 1989 and 1990. Its purpose was to reduce the cost of loaned employees by having their employers competitively bid to be staff augmentation contractors. Conceptually, Respondent believed that by limiting the number of staff augmentation contractors to those with bidding rates

---

approved by Respondent, more control could be exercised over the cost of loaned employees and ultimately, the cost of labor would be reduced. In April 1990, every Comanche Peak organization which utilized contractor personnel to augment its permanent staff was requested to submit a staff augmentation plan. The quality control organization's plan identified six receiving inspector positions which had to be filled by staff augmentation.

Under the staff augmentation plan, applications were solicited from the approved staff augmentation contractors for the six receiving inspector positions. The contractors submitted the names of thirty-two applicants, including the incumbents and the Complainant. The six incumbents were offered the positions. They all accepted.

Initially, Complainant asserts that Respondent has clearly shown animus or hostility toward him because he engaged in protected activity. Specifically, he refers to letters dated October 12, 1990 and November 9, 1990 from William Cohill and an October 24, 1990 letter from Susan Palmer. Cohill is an executive vice president in charge of nuclear engineering and Palmer's duties include acting as a liaison between Respondent and CASE, a citizens group concerned with safety at Comanche Peak. Cohill's October 12, 1990 letter was sent to every contractor doing business at Comanche Peak. It reminds each contractor that the Act and the NRC regulations "prohibit discrimination against employees for engaging in certain protected activities, which could include the raising of nuclear safety concerns." The letter instructs that these prohibitions apply not only to Respondent but also to its contractors and subcontractors. It requests that appropriate action be taken to make sure that employees are not disciplined in violation of federal law, and as a step toward achieving that objective, the contractors are asked to assure that any disciplinary action above the level of a written warning require review and approval

by Respondent's management.[7] In Cohill's November 9, 1990 letter, he requests that the contractors notify Respondent of any allegations of discrimination against them.[8]

Palmer's October 24, 1990 letter requests that certain language be added to major contracts and purchase orders to require contractors to inform Respondent of allegations of

---

discrimination against them.

Complainant's contention that these letters show a discriminatory intent by broadcasting Complainant's protected activity or by soliciting information on future whistleblower activity is rejected. Rather, the letters appear to constitute a positive effort by the Respondent to guard against harassment of employees by keeping itself informed at an early time of allegations of discrimination.

The essence of Complainant's contention is that his application for the receipt inspector position was not fairly evaluated and, had it been fairly evaluated, he would have been hired over one of the incumbents. Danny Leigh is the procurement compliance supervisor at Comanche Peak. He was responsible for evaluating and ranking the thirty-two candidates who applied for the receiving inspector positions. On a scale of 1 to 10, with the ranking of 1 being the highest, Leigh ranked Complainant a "7". Leigh testified that he found Complainant to be qualified to do the job of a receiving inspector as well as qualified in other inspector disciplines. He gave Complainant the low rating of a "7" because he interpreted Complainant's resume as showing him to be a "job shopper" and he preferred candidates that would stay "with the company and with myself for a period of time."[9] Leigh agreed that he could have rated Complainant as low as "2".

In reality the ranking of the 32 candidates had little to do with Complainant's qualifications. Leigh explained that he intended to retain the six individuals who were doing the job, if at all possible. He graded the six incumbents, and only the six incumbents, as "1". Leigh reasoned that the six individuals who were doing the job had been employed at Comanche Peak for a minimum of seven years, possessed the appropriate certifications, and were performing to his satisfaction.[10]

Leigh's desire to hold onto his receipt inspectors was consistent with the wishes of most supervisors at Comanche Peak. Lance Terry, the Director of Nuclear Overview at Comanche Peak, testified that the staff augmentation program did not result in a significant number of people being hired. He testified that "in about 90 percent of the cases where the incumbent applied, the incumbent was in fact selected,"[11] and that "[i]n almost

---

all the cases where the incumbents were not selected, it was because they priced themselves out of being competitive."[12] Terry explained why the individual supervisors preferred to retain the incumbents:

> I think with the experience that we had, with the selection process we had already come through and with the fact that we were really just beginning to operate the plant and really needed that experience at this point in time, it was [that] you had to have a reason not to select an incumbent rather than having a reason to select somebody.
> Unless the incumbent had something which disqualified him, my guess would have been that we would probably have chosen all of them.
> Q. You probably would have what?
> A. Chosen all of the incumbents, because they had already come through a lot of selection process. They were experienced in the job. They knew the entire program we were working to.
> So unless there was some distinguishing thing such as those that priced themselves out of the market, we would have expected most of them to be selected and they were.[13]

Terry also testified that the high number of incumbents selected throughout the plant did not negate the purpose of the staff augmentation program.

> Q. If you kept the incumbents in the jobs, how would TU gain anything through the staff augmentation program?
> A. The main purpose of the staff augmentation program, as I indicated a while ago, was to get more commercially acceptable rates.

[Page 14]

> These staff augmentation contractors presented markups that were significantly below the markups that had been charged by the previous personnels providing those people to us.[14]

It is determined that Complainant was not passed over for the receiving inspector position because he engaged in protective activity but rather because Leigh, like many other supervisors at the plant, intended to implement the staff augmentation program by retaining those who were then doing the job.

The Complainant also argues that he should have been hired because he is better-qualified for the receiving inspector position than most of the incumbents. Russell Triebwasser is employed by the Westinghouse Electric Corporation at its Hanford Atomic Works in Hanford, Washington as a quality assurance specialist. He worked at Comanche Peak from October, 1987 until October, 1989 as a quality control supervisor. At the request of the Complainant, Triebwasser rated the qualifications of all the individuals who applied for the receipt inspector positions. He based his opinion on a review of the individuals, resumes, the staff augmentation rules, position description of quality control receiving inspector, billing rate of each applicant and the ratings the

applicants received from Leigh. Triebwaser concluded that Complainant should be ranked as "1" and that four of the six incumbents were not qualified for the position because they do not have the two years experience in receipt inspection of procured items as required by the staff augmentation program job description.

The job description for the receiving inspector position was drafted by Leigh for the purpose of soliciting candidates under the staff augmentation program. Leigh readily admits that not all of the incumbents have the two years experience in receipt inspection of procured items required by the job description. Both Leigh and Terry explained that the job description was written for the purpose of evaluating individuals who applied from the outside in the event the incumbents could not be rehired. Leigh testified that if the incumbents were not to be retained, he considered it preferable from a "long range" outlook to bring in personnel who were qualified to work in both the operations group and the procurement compliance group.[15] However, if he was to be given the discretion to retain the

---

incumbents, he intended to do just that, because they met all of the NRC requirements and have all the certificates necessary to do the job, and, in fact, have been doing a satisfactory job.[16]

Triebwasser also testified, that in his opinion, five of the six incumbents should never have been certified as receipt inspectors because they do not have two years of "related experience" as required by NRC Rule ANSI N45.2.6. However, Jack Gallager, a training and certification officer employed by Brown & Root, who was responsible for the training and certification of incumbents, testified that all six individuals were properly trained and certified during the period 1988 and 1989. He identified the required related experience for each individual. Gallager's testimony is creditable and is accepted as showing that the incumbents were properly certified as level two receipt inspectors in 1988 and 1989.

The Complainant also contends that the Respondent deviated from its staff augmentation program when it considered the incumbents for the positions. Complainant refers to a memorandum at Complainant's Exhibit 35 titled "Comanche Peak Steam Electric Station, MMO-Contracts, Staff Augmentation Instructions" which states that "rollovers of employees between contractors are discouraged."

Prior to the staff augmentation program hiring, the incumbents were employed by Brown and Root, Inc., a contractor that had not yet been approved to take part in the staff augmentation program. In order to be considered for retention in the receipt inspector positions, the incumbents had to have their names submitted by a different contractor, one that was approved under the staff augmentation program. Complainant argues that Respondent's policy, as spelled out in Complainant's Exhibit 35, precluded the

incumbents from transferring or "rolling over" from Brown and Root, Inc. to an approved staff augmentation contractor.

Early in the implementation of the staff augmentation program the managers expressed concern about being able to retain their experienced people. Terry testified:

> It was the absolute worst time to start a turnover of experienced people, and the

---

[Page 16]

> managers and directors sat with themselves and talked to Mr. Redikan about it, sat with the VP's and talked to them about it.
> The fact that we felt, number one, we couldn't afford to lose the experienced database at that critical time to support the plant; and that, number two, we felt it would be unfair to those individuals who were presently filing those jobs to just throw them aside.[17]

As a result of the above concerns, the restrictions set forth in Complainant's Exhibit 35 against employees "rolling over" from one contractor to another were eliminated or "softened" in subsequent revisions to the staff augmentation programs dated April 9, 1990.[18] Thus, the Respondent was not precluded from retaining the incumbents in the receiving inspector positions by its own guidelines on staff augmentation.

In summary, it is determined that Complainant has not met his burden of showing that Respondent's failure to rehire him was a result of his protected activity.

FINDINGS OF FACT

1. The Energy Reorganization Act of 1974 governs the parties and the subject matter.

2. The complaint in this matter was not timely filed in that it was not filed within thirty days after the occurrence of the alleged violation as required by 29 CFR § 24.3.

3. The thirty-day statute of limitations at 29 CFR § 24.3 was not tolled by equitable considerations in that Complainant has not shown that his failure to file a timely complaint was caused by him being misled by Respondent's conduct.

4. Complainant has not established a *prima facie* case under the Energy Reorganization Act in that Complainant has not met his burden of showing that he was discriminated against because he engaged in protected activity.

[Page 17]

ORDER

AND NOW, this 31st day of January, 1992, IT IS HEREBY RECOMMENDED that the Complaint of Frank Bausemer be dismissed.

THOMAS M. BURKE
Administrative Law Judge

TMB/bac

[ENDNOTES]

[1] Post hearing briefs were due 30 days after receipt of the hearing transcripts. The transcripts were received by the parties on September 24, 1991.

[2] Respondent's Exhibit 3

[3] See *Rainey v. Wayne State University*, 89-ERA-8, 3 OALJ 3, (May 31, 1989).

[4] Complainant's Exhibit No. 46

[5] Complainant argues at page 8 of his post hearing brief that a letter from Palmer dated October 30, 1990 "convinced him that the hiring practices at Comanche Peak were being manipulated in a manner that was keeping him from getting employment ... " Complainant's Exhibit No. 49 However, the letter, on its face, does not reveal same and Complainant did not testify that he was so affected by the letter.

[6] Citizens Association for Sound Energy

[7] Complainant's Exhibit 40

[8] Complainant's Exhibit 42

[9] N.T. p.332

[10] N.T. Vol.II, p.352

[11] N.T. Vol.IV, p. 131

[12] N.T. Vol. IV, p. 132

[13] N.T. Vol. IV, p. 132-133

[14] N.T. Vol. IV, p. 130

[15] N.T. p. 319

[16] p. 352

[17] N.T. Vol. V, p. 247

[18] Testimony of Lance Terry, Vol. V, p. 247-249 and Complainant's Exhibit 37